No. 77
No. Copies
674
Office Supreme Court U.S.
FILED
MAY 13 1901
JAMES H. McKENNEY,
Clerk

Br. of Canfield for Insurers, Respts.

Supreme Court of the United States

Filed May 13, 1901.

IN THE MATTER OF THE PETITION OF THE UNION STEAMBOAT COMPANY, CLAIMANT OF THE STEAMER NEW YORK, FOR A WRIT OF CERTIORARI.

BRIEF IN BEHALF OF THE UNDERWRITERS ON THE CONEMAUGH'S CARGO, RESPONDENTS.

F. H. CANFIELD,
Counsel for Underwriters.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1901.

Supreme Court of the United States

In the matter of the petition of the Union Steamboat Company, claimant of the steamer New York, for a writ of certiorari, directed to the Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the case of the Union Steamboat Company, claimant and appellant against the propeller Conemaugh et al., claimants and intervenors.

BRIEF IN BEHALF OF THE UNDERWRITERS ON THE CONEMAUGH'S CARGO.

In behalf of the underwriters on the Conemaugh's cargo we submit that this application should not be granted for the following reasons:

I.

It clearly appears from the record, and especially by the opinion of the Circuit Court of Appeals rendered on April 2, 1901, that the question involved is one which only affects this particular case and the parties thereto. It is not one of such grave and general importance as should appeal to the court, successfully, for the *discretionary* writ of *certiorari*.

The Mer. Const. Co. vs. Jacksonville Ry. Co., 148 U. S., 372, 383.
Lau Ow Bew, petitioner, 141 U. S., 583.

The case does not involve the general question whether, in cases of collision resulting from mutual fault, the owner of one of them can recoup from the other, or her owner, a moiety of what he may have to pay on account of the loss to the cargo damaged by such collision. The owners of the Conemaugh, having never been impleaded by a cross-libel, or by a petition under the 58th General Admiralty rule, or in any other way, *that* issue was never presented in the case.

The Beaconsfield, 158 U. S., 303.

The petitioner, in the court below, asked for what, in effect, was an affirmative decree against the owners of the Conemaugh (see ex parte The Union Steamboat Company, 178 U. S., 317-320), without having filed any pleading upon which a decree could be based.

The cross-libel referred to in the record was not against the owner of the Conemaugh *in personam*, but was a libel *in rem* against the Conemaugh. But no writ was issued under this cross-libel, and therefore the Conemaugh herself was never brought into the case.

Furthermore, the record shows that the District Court by its decree on May 16, 1895, dismissed the cross-libel. This was a final decree as to every claim which could be asserted under the cross-libel, if it ever had any vitality; and as the decree was never appealed from it must be regarded as *res judicata* as to the right of the petitioner to any affirmative relief in the case, under the rule laid down in *The Dove*, 91 *U. S.*, 381.

The Circuit Court of Appeals has decided that the decree for recoupment, asked for by the petitioner, should not be granted in this case, because there was nothing in the *pleadings* which justified such a decree, and that the petitioner must seek its remedy in some other proceeding. Thus, it appears that the question involved is merely one of *pleading* in a particular case, and not one of such general importance as ought to be removed to this court by *certiorari*.

Another reason why this petition should be denied is that as pointed out by the opinion of the Circuit Court of Appeals, Rec., 17, the petitioner may assert their claim for recoupment by an independent proceeding against the Conemaugh. The denial therefore, will result in no injustice to the petitioner.

II.

As respects the rights of the underwriters on the Conemaugh's cargo, including not only those who have intervened, but also those who are represented by the owner of the Conemaugh as trustee, the case is very clearly one in which the writ should not issue.

This court has already decided that the underwriters are entitled to recover in full their damages against the New York, notwithstanding the Conemaugh was also in fault for the collision. In its opinion, delivered by Mr. Justice Brown, in *The New York*, 175 *U. S.*, 187-209, it was said:

> "4. The final question arises upon the insistence of the underwriters of the Conemaugh's cargo, that

they are entitled to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh may also be in fault for the collision. They are correct in this contention. Indeed, this court has already so decided in the case of *The Atlas*, 93 U. S., 302, 315, 317. This was a libel against the Atlas by an insurer of the cargo of a canal boat in tow of the steam tug Kate, whereby the canal boat and her cargo were lost. It was insisted by the claimant that, as the libelant had failed to make the Kate a party, and as both vessels were found to be in fault for the collision, there could be a recovery of only a moiety of the damages. The case of *The Milan*, Lush., 388, was confidently relied upon as an authority. This court, however, was of opinion that a plaintiff, who has suffered a loss by the negligence of two parties, was at liberty, both at common law and in admiralty, to sue both wrongdoers or either one of them at his election, and 'it is equally clear that if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss. He may proceed against all the wrongdoers jointly, or he may sue them all or any one of them separately. * * * Co-wrongdoers, not parties to the suit, cannot be decreed to pay any portion of the damage adjudged to the libelant, nor is it a question in this case whether the party served may have process to compel the other wrongdoers to appear and respond to the alleged wrongful act.' A like ruling was made in *The Juniata*, 93 U. S., 337, in which a libel was filed by the United States as owner of the cargo of a flatboat in tow of one of two vessels."

Under the mandate issued by this Court the District Court entered a decree giving to the underwriters a recovery of their entire damages against the New York, and that decree was approved by this court in ex parte The Union Steamboat Company, 178 U. S., 318. The right of the underwriters to a full recovery against the New York, having been directly and definitely decided and established by this court, is no longer open for controversy or debate; for the decisions referred to must be regarded as "the law of the case."

Thompson vs. Maxwell, 168 U. S., 451-456.
Egan vs. Hart, 165 U. S., 188.
Kreiger vs. Shelby Ry. Co., 125 U. S., 39.

The Lady Pike, 96 U. S., 461.
Roberts vs. Cooper, 20 How., 481.
The Nuestra Senora de Regla, 108 U. S., 101.
Loeb vs. Columbia, 179 U. S., 472.

We submit, therefore, that the cargo underwriters, being entirely innocent of fault in this case, and being entitled to payment in full for their damages, should not be hindered or delayed in the collection of what is due to them by the issue of the writ now prayed for, and that the writ should therefore be denied.

Should the court, however, conclude that the question of recoupment, as between the owners of the New York and the owners of the Conemaugh, is of sufficient importance to call for the writ of *certiorari*, then we submit that it should be so framed as not to affect the rights of the underwriters, or hinder them in the collection of their claims against the New York.

F. H. CANFIELD,
Counsel.
F. H. & G. L. CANFIELD,
Proctors for the Intervening Underwriters, and the Erie & Western Transportation Co., Trustee for Underwriters who have not intervened.

Dec. 97 13455

No. 674.

In the Supreme Court of the United States.

Brief of Counsel for Petitioner

Office-Supreme Court, U.S.
FILED
MAY 20 1901
JAMES H. McKENNEY,
Clerk.

In the matter of the petition of THE UNION STEAMBOAT COMPANY, claimant of the STEAMER NEW YORK, for a writ of *certiorari* directed to the Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the case of THE UNION STEAMBOAT COMPANY, claimant and appellant, against the PROPELLER CONEMAUGH, et al., claimants and intervenors.

May 20, 1901.

Brief for
Erie & Western Transportation Company.

We submit the petition does not present any question warranting an exercise of the supervisory jurisdiction of this court by writ of *certiorari*.

The cause has been in the courts since 1891. It was tried and re-argued in the District Court; it was heard on appeal; it was brought into this court, and every question involved determined and a decree directed, November 20, 1899.

The New York, 175 U. S., 187.

A decree was entered pursuant to the mandate. Petition for writ of mandamus was then filed by the present petitioner, and on hearing was dismissed. The Court held the decree entered did not violate the mandate; that the question presented was an "entirely new question" to the case.

Ex parte, The Union Steamboat Co., 178 U. S., 317.

The case was again appealed to the United States Circuit Court of Appeals for the Sixth Circuit. That court held that the question of recoupment was not involved in the case presented, and petitioner's application for leave to amend, and, if possible at that stage of the case, to bring the question of recoupment into the litigation, was refused.

The cause stands as it did when the decree complained of was brought before the court and held not in violation of the mandate. In other words, the only question would be one special to this particular case and relating to amendment of pleadings ; a discretionary matter at best.

Where a district judge refused a respondent leave to amend his answer by setting up a plea of laches and of *res judicata* in respect of an allegation made for the first time in a third amended libel, and the affidavit filed in support stated, as a reason for not earlier setting forth the defenses in question, that counsel "was then of opinion that his client was entitled to judgment on the defense then set up," this Court said that even if the respondent would have been entitled to the relief if reasonable diligence had been exercised and respondent's recourse was now lost by reason of the statute of limitations, still he knew of the claim against him, he was not misled by any act of the other party, and it was not an abuse of discretion to deny leave to amend.

O'Brien vs. Miller, 168 U. S., 287-309.

The Union Steamboat Company knew from the beginning of this litigation that the cargo interests were proceeding against the New York alone. If the petitioner and counsel entertained and acted upon the judgment that petitioner was entitled to the relief without claiming it, it was their own deliberate judgment. It does not appear that petitioner will lose any right if the question is not determined in the present litigation. No

special equity can be urged in petitioner's behalf; indeed, the equities call for the termination of this litigation.

Moreover, the propeller Conemaugh (owned by the Erie & Western Transportation Company) was never brought into the case at all.

The litigation has now extended over a period of ten years; the questions involved were determined by this court in November, 1899. To bring in new matter now and make new issues would continue the litigation for a further indefinite time.

If either party has, as against the other, undetermined rights, they should be asserted in an independent proceeding.

We submit the petition should be dismissed.

HARVEY D. GOULDER,
Proctor for Erie & Western
Transportation Company.

No. 94.

Brf. of Canfield for Underwriters

13457

Office Supreme Court U.S.
FILED
OCT 10 1902
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

Filed Oct. 10, 1902.

THE UNION STEAMBOAT COMPANY,
Claimant of the Propeller New York,

vs.

THE ERIE & WESTERN TRANSPORTATION COMPANY, *Owner of the Propeller Conemaugh, and the Underwriters on the Conemaugh's Cargo.*

No. 97.
October Term,
1902.

BRIEF FOR UNDERWRITERS who originally intervened in the District Court.

F. H. CANFIELD,
Proctor for Underwriters.

POTTER PRINTING CO., DETROIT, MICH.

13458

SUPREME COURT OF THE UNITED STATES.

THE UNION STEAMBOAT COMPANY,
Claimant of the Propeller New York,

vs.

THE ERIE & WESTERN TRANSPORTATION COMPANY, *Owner of the Propeller Conemaugh, and the Underwriters on the Conemaugh's Cargo.*

No. 97.
October Term,
1902.

BRIEF FOR UNDERWRITERS who originally intervened in District Court.

In behalf of said underwriters on the cargo of the Conemaugh, I desire to call the attention of the Court to the final decree of the District Court originally entered in the cause, which is appended to this brief. It will appear from the decree that the aggregate damages awarded to the owners of the Conemaugh and the cargo underwriters was $58,315.58, which included $25,424.55 incurred as salvage expenses in raising and rescuing the Conemaugh and her cargo, and that the Court reserved the apportionment of said sum, $25,424.55, for further consideration. This is shown by the last paragraph of the decree, which reads as follows:

> "And it appearing to the Court that the salvage expenses incurred in raising and rescuing said

steamer Conemaugh and her cargo, included in the aforesaid item of $25,424.55, were contributed to by the several parties interested in said steamer and her cargo, including the intervenors aforesaid, and that they are entitled to share in the amount recovered by this decree on account of said item as between themselves on the principles of general average; it is therefore further ordered that the apportionment of said sum of $25,424.55 and the interest thereon, between the said libellant as owner of said steamer and the said intervenors and others interested in said cargo, be reserved for the future determination of the court after the damages and interest awarded by this decree are paid into the registry of this court, or until the further order of the court."

It will be seen that this is a matter between the owners of the Conemaugh and the underwriters. It does not concern the owners of the New York.

What we ask is that this court in determining the case will remit it to the District Court with instructions to make the proper apportionment of these salvage expenses, to the end that all the underwriters, including the intervenors as well as those represented by the Conemaugh as trustee, may receive their due and proper shares.

Undoubtedly it is the rule in cases of collision, resulting from mutual fault of both vessels that the damages as between those vessels, or their owners, are to be equally divided. But it is also well established that the owners and underwriters on the cargo injured by the collision are entitled to recover their full damages against either of the vessels in fault. They may proceed in their own names against either or both. In this case they proceeded against the New York alone as they were entitled to do. Some of the underwriters proceeded in their own names as intervenors in the suit, some were represented by the owner of the Conemaugh as trustee. But whether they inter-

vened in their own names or were represented by the Conemaugh as trustee, all of the underwriters are entitled to recover their *full* damages from the New York. This right of full recovery against the New York of all the damages suffered by the cargo is not limited to the underwriters who intervened in their own names, but extends as well to the underwriters who are represented by the Erie & Western Transportation Company as trustee. This necessarily results from the opinion of this Court in *The New York*, 175 U. S., 187, and in *Ex Parte Union Steamboat Company*, 178 U. S., 317.

Whenever one of the vessels is proceeded against for the damages done to the cargo, and her owners are compelled to pay on account of the cargo, a sum, which, together with her own damages exceeds one-half of the entire damage resulting from the collision, the only way of working out the equal division of the entire loss is by allowing her owners to *recoup* from the other offending vessel, or her owners, the sum necessary to equalize the loss. It is quite evident that this cannot be done without the filing of the necessary libel, or cross-libel, or pleading of some kind, claiming the right to recoup, as basis for such a decree.

This equal division of damages as between the two intervening vessels cannot be arrived at, at the expense of the cargo owners, for they are to be paid in full by the owner of the vessel against which they have proceeded.

I.

The real gist of the complaint now made by the owners of the New York is the refusal of the Courts below to enter the decree proposed by them, and which is set forth on page 7 of their Counsel's brief, which decree is objectionable upon sev-

eral grounds: one of which is that while it may equalize the damages as between the two vessels, it does "so at the expense of the underwriters on the cargo of the Conemaugh." This is clearly shown by the opinion of the Circuit Court of Appeals (Rec., 46-47).

Such a decree would defeat the right of these underwriters "to a recovery of the full amount of their damages against the New York," which was expressly sustained by this Court in the case above cited.

The proposed decree is not in accordance with the mandate of this Court, set forth at page 22 of the record.

The decree proposed by the petitioner, although not so in form, is, in effect, an affirmative decree in its favor. This is recognized by this court in 178 U. S., at page 320, where it is expressly said that:

> "The equal division applied only to the vessels, and on the other hand, if the petitioner be entitled to the recoupment claimed, it would, apparently, result in an affirmative decree in its favor,"

which ought not to be allowed without some pleading upon which to base it.

The general proposition of counsel for the petitioner, on page 21 of their brief, is to the effect that the court may, in all cases of collision resulting from the mutual fault of two vessels, allow a decree of recoupment in favor of the owner of the vessel proceeded against where such a decree is necessary to equalize the loss, without such relief being askked for in any pleading filed in the cause, is not only without precedent to support it, but it is unsound in principle and ought not to be sustained.

Suppose the ships A and B collide and the owners of

A libel B, and the owners of the cargo of A file intervening libels against B; and it is found that both ships were in fault; that A and B were each damaged to the amount of $10,000, and the cargo of A to the amount of $20,000, and its owners were awarded a decree against B which her owners pay. To effect a divsion "of all the damages equally," an affirmative decree would have to be awarded to the owners of B against the owners of A for the sum of $10,000. Is there any precedent or authority, or any principle, which would justify the court in making such a decree, unless it be asked for by some pleading in the cause?

Again, suppose in such a case the cargo of the B to be damaged to the amount of $20,000. Its owners intervene in a suit commenced by the owners of A and recover a decree against B: Could they recover $10,000, the sum necessary to equalize the loss against A, or her owners, without any pleading asking for such a recovery?

Suppose in the case at bar the damages suffered by the New York exceeded the damages suffered by the Conemaugh: To equalize the entire damage the New York would be entitled to recover one-half of the sum paid by her as damages to the owners of the Conemaugh's cargo. Such a decree in her favor would necessarily be an affirmative decree, which, without some pleading to base it upon, should not be granted unless all the rules of practice and pleading heretofore recognized by the courts are now to be treated as abolished.

Again, suppose in this case, the New York's cargo had been damaged, and its owners had intervened in the cause against her, and both vessels being found in fault, the cargo owners had been awarded their full damages against the New York. Is there any doubt that the equalization of the damages between the two steamers could not be worked out in the absence of some proper pleading for that purpose?

It is not enough that "all the parties are before the Court." They must be there in the proper capacity. They must be properly impleaded to authorize a decree in favor of the one and against the other.

The Enterprise, 2 Curtis, 319;
The Zodiac, 5 Fed., 220-224;
The Sabine, 101 U. S., 384.

The fact that some of the underwriters are represented by the owners of the Conemaugh as trustee does not affect the case. The right to a full recovery of their entire loss is the same whether they appear by their trustee or in their own names. A party suing in his own right, and as trustee, appears in two distinct capacities. Whatever rights the owners of the cargo could enforce against the New York, if they intervened in their own names, may be enforced in the name of the owner of the Conemaugh as trustee. Therefore the underwriters who are represented by the Erie & Western Transportation Co., owner of the Conemaugh, as trustee, are entitled equally with those who intervened in their own names to recover their full damages against the New York.

The Beaconsfield, 158 U. S., 303-309.

If the petitioners had filed a *proper cross libel,* or, perhaps, if it had appealed from the decree of the District Court which dismissed the cross libel which it filed, the case might be different. (*The Dove,* 91 U. S., 981.) So, also, if it had proceeded against the owners of the Conemaugh under the 59th General Admiralty Rule, a different case would be presented.

The Beaconsfield, 158 U. S., 303.

The petitioner, it is true, was not obliged to do either. It might have instituted another original suit. It still has this remedy. But as was said in the *Juniata,* 93 U. S., 337, it cannot enforce its supposed rights in *this* litigation. Nor can it do so in any litigation *"at the expense of the underwriters."*

AS TO THE RATE OF INTEREST.

Petitioner's Counsel contend that interest should have been allowed at the rate of 6 per cent. (brief, p. 6); in the decree which they ask to have entered (brief, 5), 5 per cent. is the rate named.

This court, by its mandate, directed the district court to enter a decree, with interest from July 3, 1896, until paid, at the rate per annum that *decrees* bear in the courts of the State of Michigan. (23.)

The rate of interest which decrees bear in the State of Michigan is expressly provided for by Section 4865 of the Compiled Laws of Michigan of 1897, which reads as follows:

> (4865). Sec. 6. "Interest may be allowed and recovered upon all judgments at law, for the recovery of any sums of money, and upon all *decrees* in chancery for the payment of any sums of money, whatever may be the cause or form of action or suit in which such judgment or decree shall be rendered or made; and such interest may be collected on execution, at the rate of *seven* per centum per annum; Provided, That on a judgment rendered on any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument, not exceeding ten per centum."

This is the only statute in Michigan which, in terms, provides for interest on judgments and decrees. It has been embodied in, and has formed a part of the laws of the state since 1838 to the present time; and always as a distinct and independent section, in substantially the same form. It appears in the Revised Statutes of 1846 and in the various compilations of the laws of the state "in force," made under legislative authority

in 1857, 1871 and 1882, and, finally, in the last compilation of 1897, made six years after the Act of 1891, upon which petitioner's counsel base their argument was adopted.

See:

How. Ann. Stat., Sec. 1597;
Comp. Laws of 1857, Sec. 1317;
Comp. Laws of 1871, Sec. 1635.

The statute quoted is plain and unambiguous. But counsel for the appellant claims that notwithstanding it appears in the compilations of the law "in force" in 1897, it was *repealed* by virtue of the Act of 1891.

Session Laws of 1891, page 197;
Comp. Laws of 197, page 1533.

I insist that Sec. 4865 remains "in force," and is not affected by the Act of 1891, or the amendment thereto of 1899. I base my argument upon the well settled rules of construction applicable in such cases; the decisions of the Supreme Court of the State; and the practical construction which the statute has received.

The Act of 1891 relates only to interest on *contracts*, and not to interest on judgments and decrees. It reads as follows:

> "An Act to regulate the interest of money on account, interest on money, judgments, verdicts, etc.
>
> "Section 1. *The People of the State of Michigan enact*, That the interest of money shall be at the rate of six dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases, it shall be lawful for the parties to stipulate in writing, for the payment of any rate of interest not exceeding eight per cent. per annum: *Provided*, That this act shall not apply to existing contracts, whether the same be due, not due, or part due.
>
> "Sec. 2. No bond, bill, note, contract or assurance, made or given for or upon a consideration or contract, whereby or whereon a greater rate of in-

terest has been, directly or indirectly, reserved, taken or received, than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract or assurance, except as is provided in the following section, if it shall appear that a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, the defendant shall not be compelled to pay any interest thereon.

"Sec. 3. Whenever it shall satisfactorily appear by the admission of the defendant, or by proof that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt has been taken or received in violation of this act, the court shall declare the interest thereon to be void.

"Sec. 4. All acts or parts of acts contravening the provisions of this act are hereby repealed."

(It is unnecessary to refer to the amendment adopted in 1899, except to say that it simply changed the rate from 6 to 5 per cent. *Public Acts of* 1899, p. 324.)

This statute of 1891 simply relates to the rate of interest on *contracts*. It does not include *judgments or decrees*.

The statute relating to interest on contracts as it existed prior to 1891, is to be found in 1 *How. Ann. Stats.,* Sections (1594) and (1595).

A comparison of said section 1594 with section 1 of the Act of 1891, it will be found that aside from the proviso contained in said section 1, that the two are identical, except that the word *seven* in section 1594 has been changed to *six*.

Sec. (1595), like Sec. 2 of the Act of 1891, relates only to the effect of usury and the penalty therefor.

Plainly Secs. (1594) and (1595) relate to interest on contracts, express or implied, while interest on judgments, verdicts and decrees are provided for by Sec. (1597) (How. Stats.), which has become Section 4865, of the present Comp. Laws of the State of 1897.

By the common law judgments and decrees do not bear interest.

Freeman on Judgments, Sec. 441;
Black on Judgments, Sec. 381;
Washington, etc., Co. vs. Harmon, 147 U. S., 571.

It will be presumed that the Legislature knew this, and was therefore careful to provide, expressly, by a special section of the statute, above quoted, that judgments and decrees in the State of Michigan should bear interest at a rate specified therein. This was done as early as 1838. (Rev. Stats. of 1838, page 161.) And this special section has been retained in every revision and compilation of the laws of the State since 1838, including the revision of 1846 and the compilations of 1857, 1871 and 1882, as well as the compilation of 1897, which was made six years after the Act of 1891 was adopted.

It will be observed that Sec. 1 of the Act of 1891 (with the exception of the proviso), is identically the same as Sec. 3 of the Rev. Stats. of 1838, being Sec. 3, Chapt. 34 of the Rev. Stats. of 1846 (How. Stats., Sec. 1594), except as to the *rate* of interest.

If Sec. 1 of the Act of 1891 is broad enough to include interest on judgments and decrees, Sec. 3 of the old law (How. Stat., Sec. 1594) is also broad enough for that purpose. But if this is true of the old law, why was the Legislature when it adopted that law, careful to include a special section, which, in express terms, provides for interest on judgment and decrees? Why has it preserved this distinct and separate section for more than sixty years, through all the subsequent revisions and compilations of the statutes, if it was not necessary in order that judgments and decrees should bear interest?

An examination of these several statutes leads, irresistibly, to the conclusion that Sec. 1 of the Act of 1891 was intended merely as a substitute for Sec. 1594 (How. Stats.), and that the purpose of the Legislature was simply to reduce the rate of

interest on *contracts* from seven to six per cent., leaving the rate of interest on judgments and decrees to be governed by Sec. (4865), of the Laws of 1897, which we have already quoted.

The Act of 1891 does not expressly repeal Sec. 4865, which provides for interest on judgments and decrees. It only repeals such acts and parts of acts as *contravene* its provisions. Sec. 4865 does not contravene the provisions of the Act of 1891. The former relates to interest on judgments and decrees, while the latter only relates to interest on *contracts, express or implied.*

Repeals by implication are not favored; the rule being that there must be a *positive repugnancy* between the provisions of the new statute and those of the old in order to work a repeal by implication.

In *Rosecrans vs. U. S.*, 165 U. S., 257, it is said:

> "Where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation, equally express and is not overthrown by mere inferences or implications to be found in such subsequent legislation."

This is peculiarly applicable to the present case. The Legislature has expressly legislated in respect to interest on judgments and decrees; and the subsequent legislation of 1891 does not, in express terms, refer to *such* interest. Therefore the former legislation cannot be considered as having been repealed.

This is a general rule of construction, and has been followed by the Supreme Court of Michigan in many cases.

People vs. Hanrahan, 75 Mich., 622;

Rice vs. Hosking, 105 Mich., 303-306;
Brown vs. McCormick, 28 Mich., 215;
Conners vs. Iron Co., 54 Mich., 168;
Canal & R. Co. vs. Attorney General, 79 Mich., 353.

See particularly, *University Regents vs. Auditor General,* 109 Mich., 134, which involved the construction of the statutes relating to interest.

Also:

Wood vs. United States, 16 Peters, 342;
Chew Heong vs. U. S., 112 U. S., 549;
Frost vs. Wenie, 157 U. S., 46.

There is no inconsistency or conflict between a statute which, in terms, provides for interest on judgments or decrees, and one which fixes the rate of interest in matters of contract and prescribed a penalty for usury. The two may well exist together in perfect harmony. Therefore the Act of 1891 did not repeal the prior statute providing for interest on judgments and decrees.

Henderson's Tobacco, 11 Wall., 652;
United States vs. Tymen, 11 Wall., 92;
State vs. Stoll, 17 Wall., 431.

As to the effect which should be given to the title of the Act of 1891. It reads, literally, as follows:

> "An Act to regulate the interest of money on account, interest on money, judgments, verdicts, etc."

It will be noted that the title does not contain the word "decrees," which is contained in Sec. 4865 (already quoted), which declares that

> "Interest may be allowed and received upon all judgments at law, for the recovery of any sums of

> money and upon all *decrees* in chancery for the payment of any sums of money."

There is a distinction between judgments and decrees. They are not synonymous. By judgments, we mean the final sentence of a court of common law; and by decrees, we mean the final order or sentence of a court of equity, or some other court proceeding according to the course of a court of equity. This distinction has been recognized by this Court.

Thus, by the Act of 1842, U. S. Rev. Stats., 966, it is provided that:

> "Interest shall be allowed on all *judgments* in civil causes, recovered in a Circuit or District Court."

And it has been held that this did not embrace *decrees* in equity, but is confined to judgments at law.

Perkins vs. Fourniquet, 14 How., 328, 331;
Hagerman vs. Moran, 75 Fed., 97.

If the Act is read without the title, no one would suppose that it was intended to include either judgments, or decrees in chancery. The title of an act furnishes but little aid in its construction. It cannot extend its effect or meaning beyond the scope of the text or body of the act itself.

Hadden vs. Collector, 5 Wall., 107;
U. S. vs. Church, etc., 36 Fed., 304;
Wilson vs. Spaulding, 19 Fed., 304;
U. S. vs. Palmer, 3 Wheat., 610;
Northern Pacific R. Co. vs. Barden, 46 Fed., 592;
Goodlett vs. Louisville R. Co., 122 U. S., 391.

There are various sections of the Compiled Laws of Michigan relating to interest which are distinct from the gen-

eral provisions of the Act of 1891, as to interest upon contracts, and which were *in force* long before the Act of 1891 was adopted. Thus, in addition to section 4865, relating to interest on judgments and decrees, there is section 1195 (How. Stat., 5361), which provides for interest on certain educational funds of the State; also section 1196 (How. Stat., 5360), providing for interest on the University fund, and which the Supreme Court, in *University Regents vs. Auditor General,* 109 Mich., 134, expressly decided has not been affected by the Act of 1891. There is also section 10,470 (How. Stat., 8139), respecting interest on judgments rendered against incorporated banks, which provides that the plaintiff in such judgments shall recover "ten per cent. a year" instead of the rate established by law; and Sec. 3912, which provides that money due for delinquent taxes shall, after a certain date, bear interest at the rate of eight per cent. All of these statutes relate to *interest on money,* and if the appellant's argument is sound all of these statutes have been repealed or amended by the Act of 1891. All of these statutes contravene the Act of 1891, quite as much as does section 4865, relating to interest on judgments and decrees.

The decisions of the Supreme Court of the State regard Section 4865 as being still in force.

Hayden vs. Hefferan, 99 Mich., 262, decided in 1894, three years after the Act of 1891 was adopted, involved the question whether a judgment for costs in favor of an appellant in an appeal from the Probate Court would bear interest. The Court said:

> "A judgment for costs is as much a judgment as any other, and is therefore within the terms of the statute. * * * Interest upon claims allowed against the estates of deceased persons may be claimed under Section 1597, How. Stat. [Sec. 4865, Comp. Laws of 1897], is broad enough to cover the present case."

In *F. & P. M. R. Co. vs. Board of State Auditors,* 102 Mich., 500, the Court said that:

> "as between individuals it was settled in *Hayden vs. Hefferan,* that the prevailing party is entitled to interest upon the costs from the date of the judgment or decree; and that the State is subject to precisely the same liability for costs and for the incidents of the judgment as an individual would be, with the single exception as to the method of collecting the demand."

Both of these cases recognize Sec. 4865 as being still in force and they afford a satisfactory answer for the argument that that section was repealed by the Act of 1891.

If the Legislature intended that the Act of 1891 should include judgments and decrees it could easily have said so, and would doubtless have used apt words to express its meaning.

The final proposition of petitioner's counsel, on page 49 of their brief, that there is a uniform rule in the Admiralty Courts which allows interest at the rate of six per cent., irrespective of the rate allowed by the local law of the State where the cause is tried, seems quite inconsistent with the rest of their argument, and with their proposed decree, in which they specify the rate of interest at five per cent. Why should they ask the court to allow them five per cent. in this case if there is a general rule of the Admiralty which allows six per cent.?

It is true that the allowance of interest in Admiralty causes, as a general rule, rests in the discretion of the Court. And in the exercise of this discretion, the Court may fix the *rate* of interest. This Court, in the exercise of its discretion, has allowed interest in this case *"at the same rate per annum that decrees bear in the Courts of the State of Michigan."* Such is the language of its decree and mandate, *and this is the law of*

this case. The term during which that decree was entered is long since past and it cannot now be modified.

I submit that the decree of the Court below should be affirmed.

F. H. CANFIELD,
Proctor for Underwriters who
originally intervened in District
Court.

ORIGINAL DECREE OF DISTRICT COURT.

Afterwards, at a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room in the City of Detroit, in said District, on Friday, the third day of July, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Hon. Henry H. Swan, District Judge

THE ERIE AND WESTERN TRANSPORTATION COMPANY,
Libellant,
vs
THE PROPELLER "NEW YORK," *her engines, etc.;*
The Union Steamboat Company,
Claimant and Respondent.

On Libel for Damages for Collision. In Admiralty.

On reading and filing the report of D. J. Davison, the Commissioner to whom it was referred to ascertain and report the damages resulting from the collision in this cause, which report was filed on the 18th day of June, 1896, by which there is reported due to the Libellant in its own behalf as owner and as trustee for the underwriters on the propeller Conemaugh, the sum of twenty-five thousand four hundred and twenty-four and 55/100 dollars ($25,424.55), including the cost of raising and repairing said propeller, together with the expenses incurred in and about the rescuing and caring for the cargo of said steamer; and that there is also due to said Libellant, as trustee for the owners of and the underwriters on the cargo of said steamer, the further sum of thirty-two thousand eight hundred and ninety-one and 3/100 dollars ($32,891.03), exclusive of expenses incurred in and about the raising and saving of the said cargo, making the aggregate damages due to the said Libellant in its own behalf and as trustee as aforesaid, the sum of ($58,315.58); and on reading and filing the exceptions to said report, and after hearing the arguments of Counsel, and the same having been duly considered, and it appearing to the Court that interest is equitably allowable on the amount of said damages for the period of three years and four

months, it is therefore ordered, adjudged and decreed that said report be, and the same is hereby modified so as to allow interest at the rate and for the time aforesaid, and that said report be in all other respects, ratified and confirmed as between the libellant and the claimant in said cause, and its surety on the bond or stipulation filed herein.

And it is further ordered, adjudged and decreed that the said Erie & Western Transportation Company in its own behalf and as trustee for the underwriters on said steamer Conemaugh, and as trustee for the parties interested in the cargo of said steamer, as owners or underwriters thereof, recover of the said Union Steamboat Company, claimant in this cause, the sum of sixty-nine thousand nine hundred and seventy-eight and 9/100 dollars ($69,978.91), being the amount of the damages aforesaid, together with interest thereon at the rate of six per cent. per annum, for the period of three years and four months, and that the said libellant also recover its costs of suit to be taxed. And it further appearing that the said Propeller New York was duly proceeded against *in rem* in this cause, and that she was thereafter duly bonded by the Union Steamboat Company, a corporation, as Claimant and owner thereof, and the American Surety Company, of the City of New York, a corporation, as surety, by their bond or stipulation, in the sum of seventy thousand dollars, conditioned to abide the decree of this Court in this cause, on motion of John C. Shaw, proctor for the libellant, and F. H. & Geo. L. Canfield, proctors for the intervenors in said cause, it is further ordered, adjudged and decreed that judgment be, and the same is hereby entered against the said Union Steamboat Company, claimant, and the said American Surety Company of the City of New York, as surety, as aforesaid, for the aforesaid sum of $69,978.91, with interest from the date of this decree, and the costs of suit to be taxed.

And it is further ordered, that unless said damages, interest and costs be paid into the registry of this Court, within ten days from this date that execution be issued against the said claimant and surety in due form therefor.

And it further appearing that the British and Foreign Marine Insurance Company, Limited, the Union Marine Insurance Company, Limited, the Marine Insurance Company, Limited, and the Insurance Company of North America, were insurers on portions of the cargo of the said steamer Conemaugh, which were lost or damaged by reason of the said collision, and that the same was duly abandoned to them by the owners there-

of, and that they have intervened in this cause for the protection of their respective interests; and it also appearing to the Court from the report of said Commissioner that the damages resulting from said collision to said several insurers of said cargo, who have intervened as aforesaid, exclusive of expenses incurred by them in and about the salving and handling of the cargo, but including interest, is as follows, to-wit: To the British and Foreign Marine Insurance Company, Limited, the sum of two thousand one hundred fifty-eight and 75/100 dollars ($2,158.75).

To the said Union Marine Insurance Company, Limited, the sum of seven thousand four hundred and eighty-three and 20/100 dollars ($7,483.20).

To the said Marine Insurance Company, Limited, the sum of eight hundred twenty-two and 49/100 dollars ($822.49); and to the said Insurance Company of North America the sum of six thousand six hundred seventy-nine and 23/100 dollars ($6,679.23).

It is therefore ordered and decreed that out of the aforesaid sum of $69,978.91 there be apportioned and paid to the said British and Foreign Marine Insurance Company, Limited, the said sum of $2,158.75, with interest from the date of this decree.

To the said Union Marine Insurance Company, Limited, the said sum of $7,483.20, with like interest.

To the said Marine Insurance Company, Limited, the said sum of $822.49, with like interest; and to the said Insurance Company of North America the said sum of $6,679.23, with like interest.

And it appearing to the Court that the salvage expenses incurred in raising and rescuing said steamer Conemaugh and her cargo, included in the aforesaid item of $25,424.55, were contributed to by the several parties interested in said steamer and her cargo, including the intervenors aforesaid, and that they are entitled to share in the amount recovered by this decree on account of said item as between themselves on the principles of general average; it is therefore further ordered that the apportionment of said sum of $25,424.55 and the interest thereon, between the said libellant as owner of said steamer and the said intervenors and others interested in said cargo, be reserved for the future determination of the Court after the damages and interest awarded by this decree are paid into the registry of this Court, or until the further order of the Court.